90-1048

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

ALEXANDER MALICK,
Petitioner,

vs.

SANDIA CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

ALEXANDER W. MALICK
13 Buckeye Lane
Danville, CA 94526
(415) 837-6781
Petitioner-Pro se

QUESTION PRESENTED

The question presented for review is:

Whether summary judgment granted pursuant to Federal Rule of Civil Procedure 56 unconstitutionally denies the Seventh Amendment right of trial by jury.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner Alexander W. Malick respectfully prays that a writ of certiorari issue to review the order and memorandum of the Ninth Circuit Court of Appeals, entered on September 24, 1990.

OPINION BELOW

An independent action in equity to vacate summary judgment in the underlying action was dismissed by the District Court. The memorandum of the Ninth Circuit Court of Appeals affirming the dismissal, de novo, and ruling that summary judgment does not violate the Seventh Amendment, is set out in the Appendix.

JURISDICTION

Judgment of the Ninth Circuit Court of Appeals was entered on September 24, 1990. The petition for a writ of certiorari is filed within ninety (90) days of that date. The court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND RULE OF COURT INVOLVED

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise reexamined in any court of the United States, then according to the rules of the common law.

United States Constitution, Amendment 7

---The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.---

Federal Rule Civil Procedure 56(c)

STATEMENT OF THE CASE

The jurisdiction of the district court in the original and underlying action (N.D. Cal. No. C-83-4836RHS) was invoked under 28 U.S.C. 1332(a) because of diversity of citizenship, the plaintiff, Malick, being a citizen of California, the defendant, Sandia, incorporated in Delaware and the amount in controversy exceeding $10,000.00.

This petition arises from the dismissal of an independent action in equity (N.D. Cal. No. 89-2765 WWS), to vacate summary judgment for the extrinsic mistakes of the lack of federal question jurisdiction and, the unconstitutional denial of the right of trial by jury.

In the underlying action damages were sought as measured by employee benefits denied to the plaintiff, Malick, because he was fraudulently designated an independent contractor instead of an employee by his employer, the defendant, Sandia. A consequence of the denial was that Malick was never a participant or beneficiary of an employee benefit plan, a necessary condition for ERISA[1] federal question jurisdiction, (29 U.S.C.

[1] ERISA - Employee retirement Income security Act.

1002(7), 29 U.S.C. 1132(a)(1)(B)). The district court granted summary judgment on ERISA grounds and the appellate court affirmed de novo on separate ERISA grounds, (9th Cir. No. 85-2299 unreported) deferring to the decision of ERISA trustees composed of Sandia employees. The court ruled that Malick was not entitled to relief under federal or state law concluding that "The committee of (ERISA) trustees did not act arbitrarily or capriciously." No state law grounds were given.

The district court dismissed the independent action on grounds of res judicata and law of the case without addressing the constitutional issue. (Oral hearing denied). The appellate court affirmed de novo (9th Cir. No. 89-16591 unreported) on grounds of res judicata (oral

hearing denied). The court added "A grant of summary judgment does not violate the Seventh Amendment right to a jury trial. (Citations) . . . ("the function of a jury is to try the material facts; where no such facts are in dispute, there is no occasion for jury trial. Thus, the right to trial by jury does not prevent a court from granting summary judgment.") (Appendix, p. A-7)

The court branded the appeal "frivolous" and granted sanctions.

REASONS FOR GRANTING THE PETITION

Summary Judgment Under Fed. Rule Civ. Proc. 56 Unconstitutionally Violates the Seventh Amendment Safeguard Against a Biased, Corrupt or Otherwise Oppressive Judge Interfering With or Obstructing the Common Law Right of Trial by Jury.

-A-

This petition presents a question of vital concern to litigants in the federal courts-whether

summary judgment pursuant to Fed. Rule Civ. Proc. 56 unconstitutionally denies the Seventh Amendment right of trial by jury.

Justices of this Court have noted how the Seventh Amendment guarantee has been diminished by judicial action. Galloway v. United States, 319 U.S., 372, 397 (1943) (Justice Black dissent), Colgrove v. Battin, 413 U.S. 149, 166 (1972) (Justices Marshall and Stewart dissent), Parklane Hosiery Co. v. Shore, 439 U.S. 322, 339 (1978) (Justice Rehnquist dissent).

Judicial action in adopting Fed. Rule Civ. Proc. 56 and applying it, as in this case, has resulted in the outright violation of the Seventh Amendment guarantee of the right to trial by jury.

With the approaching bicentennial anniversary of the Bill of Rights on December 15, 1991, it is

appropriate to consider the constitutionality of Rule 56 in light of the intent and purpose of the Seventh Amendment in preserving the right of trial by jury.

-B-

By historical standards, summary judgment under Rule 56 violates the Seventh Amendment. Summary judgment is outside the ambit of the substantive common law procedures and practices contemplated by the amendment, when adopted in 1791, to preserve the values of trial by jury.

This Court has frequently ruled on the Seventh Amendment[2] and has held that the content of the right to trial by jury as expressly preserved by the Seventh Amendment, must be judged by historical

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[2] Schopler, Supreme Court's Construction of Seventh Amendment's Guarantee of Right to Trial by Jury, 40 L.Ed.2d 846 (1974).

standards,[3] and the right is that which existed under the English common law when the Amendment was adopted in 1791[4]. The court has further held that the aim of the Seventh Amendment is to preserve the substance of the common law right of trial by jury, as distinguished from matters of form and procedure, and to retain the common law distinction between the province of the court and that of the jury.[5] The Seventh Amendment requires that a common law

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[3] Curtis v. Loether, 415 U.S. 189, 193 (1974), Colgrove v. Battin, 413 U.S. 149, 155-156 (1973), Ross v. Bernhard, 396 U.S. 531, 533 (1970), Capital Traction Co. v. Hof, 174 U.S. 1, 8-9 (1899), Parsons v. Bedford, 3 Pet. 433, 446 (1830). See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 339-346 (1978) (Justice Rehnquist dissent and history of Seventh Amendment).

[4] Baltimore and Carolina Line v. Redman, 295 U.S. 654, 657 (1935), Luria v. United States, 231 U.S. 9, 27-28 (1913), Thompson v., Utah, 170 U.S. 343 (1898).

[5] Baltimore and Carolina Line, supra at 657. Accord Colgrove v. Baltin, supra at 156-157, Galloway v. United States, 319 U.S. 372, 390 (1943), Gasoline Products Co. v. Champlin Refinery Co., 283 U.S. 494, 498 (1931).

suit be heard by a jury today if that same type of suit would have been heard by a jury in 1791.

Fundamental to suits at common law is the resolution of issues of fact by the jury and issues of law by the judge; "ad questionem facti non responden judices, ita ad questionem juris non respondent jurat."[6] How the issues of fact are established is determined at common law, not by the judge or jury, but by the pleading process. After the plaintiff's evidence is publicly heard before judge and jury, the judge may determine if factual issues are genuine, that is, whether reasonable minds could arrive at more than one conclusion from the evidence. These substantive common law procedures, developed over 600

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[6] Downman's Case, 9 Co. Rep. 13a, 77 Eng. Rep. 743 (K.B. 1585).

years, defined the province of judge and jury with the object of making the system of justice judge-proof and jury-proof.

Summary judgment pursuant to Fed. Rule Civ. Proc. 56 acts to contradict the purpose of the Seventh Amendment, the substantive common law procedures contemplated in the Amendment, and the rulings of this Court. Rule 56 grants a judge power to examine evidence of unseen affiants and deponents without benefit of a jury's presence, and to foreclose a jury trial by a discretionary decision that there is no "genuine" issue. Such evidence does not rise to common law standards. The Rule relies on deposition evidence obtained under unsupervised adversary conditions where the unrestrained character of a corrupt or over-zealous attorney can subvert the object of full

disclosure. Here the incentive of non-disclosure prevails to offer such an attorney a far better opportunity of winning a case, making more money and avoiding malpractice suits.[7]

In this case of fraud, neither party nor any witness was ever seen by a judge. Evidence by unseen witnesses is at odds with the common law which places great emphasis on the credibility of witnesses as determined by demeanor and cross examination. Many a glib liar has gone undetected in a deposition only to be exposed on the witness stand before a jury in the charged atmosphere of a courtroom. And many a crafty attorney, overbearing at a deposition but unctuous in a courtroom, has failed to "con" a jury.

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[7] Brazil, The Adversary Character of Civil Discovery: a Critique and Proposal for Change. 31 Vanderbilt Law Rev. 1295 (1978).

Rule 56 permits a judge to use partial evidence to determine the existence of factual issues. The procedure clashes with the common law. This Court has ruled before "Whether in a given case there is a right to a jury trial is to be determined by an inspection of the pleadings and not by an examination of the evidence."[8]

-C-

The principal value to be preserved by the Seventh Amendment is limiting the power of the government and its agents to interfere with the peoples' right to a trial by jury. The longstanding demand of the people for the right

[8] Slocum v. New York Life Ins. Co., 228 U.S. 364, 398 (1912).

of trial by jury,[9] expressed in the Seventh Amendment, was not because a jury was considered as simply a good thing, or that a judge was considered incapable of deciding factual issues, or the existence thereof. It was because judges were not trusted. The rights of the people were not to be subjected to harsh rules without regard to individual circumstances or to unjust laws without regard to the unjustness,[10] or to decisions arrived at systematically; rights were not to be subjected to judges who were biased,

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[9] See - Declaration of Rights, 1765 (Stamp Act Congress); Declaration of Rights, 1774 (Continental Congress); Declaration of Independence, 1776; State Constitution of Ten Original States, (Thorp); Proposals to Amend the Constitution by ten Ratifying States (Elliots Debates); Northwest Ordinance, 1787.

[10] See generally, Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. Law Rev. 639, 670-673, 745 (1973).

corrupt,[11] or otherwise oppressive or to the unfortunate judge who was eccentric or senile, or just worn out physically or spiritually.[12]

The anti-federalists were the driving force behind the Seventh Amendment. They objected to the constitution because there was no Bill of Rights to protect the individual from government excesses. The cardinal objection was the absence of the guarantee of trial by jury to guard against corrupt judges. Even their principal opponent, the leading federalist Alexander Hamilton said of trial

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[11] By 1962, at least 32 Federal judges have been subject to the extreme process of congressional investigation, impeachment proceedings or criminal action. See Borkin, The Corrupt Judge, (1962). This averages about one judge every five years, and the rate has not decreased.

[12] Federal judges up to the highest level have been found inept. Frankel, Removal of Judges: California Tackles an Old Problem, 49 A.B.A.J. 166 (1963).

by jury "The strongest argument in its favor is that it is a security against corruption."[13]

The danger of inept judges has been acknowledged by this Court in a Sixth Amendment criminal case and the due-process reasoning by Justice White applies to the same judge when presiding over a Seventh Amendment civil case, "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard . . . against the corrupt or overzealous prosecutor and against the complaint, biased or eccentric judge . . . jury trial provisions . . . reflect . . . the reluctance to entrust plenary

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[13] The Federalist, No. 83 (1788), Modern Library Ed., p. 544-545.

powers over life and liberty of the citizen to a judge or group of judges."[14]

Justice Rehnquist has noted that "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign or it might be added, to that of the judiciary.[15] (emphasis added).

Justice Black has observed how judges are subject to temptation, "The plain fact is that this case illustrates that the summary judgment technique tempts judges to take over the jury

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[14] Duncan v. Louisiana, 391 U.S. 145, 156 (1967).

[15] Parklane Hosiery Co. v. Shore, supra at 343.

trial, thus depriving parties of their constitutional right to trial by jury."[16]

No better example of Justice Black's observation is this case where fraud was the central issue of the complaint. Yet, the appellate court in a de novo ruling, deferred to the decision of an administrative committee and affirmed summary judgment where neither the committee nor the court addressed the claim of fraud. Nor was either competent to do so without the benefit of examination of witnesses, which did not occur.

The Seventh Amendment limitation on the power of judges to interfere with the right of a trial by jury is subverted by Rule 56.

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[16] First National Bank v. Cities Services, 391 U.S. 253, 304 (1967) (dissenting opinion).

-D-

There is no authority supporting the proposition that summary judgment pursuant to Fed. Rule Civ. Proc. 56 is in accord with the Seventh Amendment.

This Court has stated in dictum "Fidelity and Deposit Co. v. United States, 187 U.S. 315, 319-321 (summary judgment does not violate the Seventh Amendment)."[17] The summary judgment referred to is not the general summary judgment pursuant to Fed. Rule Civ. Proc. 56.

The ruling in Fidelity was a default judgment in an action ex contractu where the defendant failed to show, in an affidavit supporting his plea, a good defense. The judgment was grounded on the common law device of striking a sham plea by

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[17] Parklane Hosiery Co. v. Shore, supra at 336.

a defendant made to delay proceedings. It was limited to actions ex contractu for money owed for a debt, liquidated damages, or a judgment. The procedure originated to satisfy the demand by merchants for quick debt collection and was absorbed by the common law when the law merchant fell into disuse.[18]

In Fidelity, this Court affirmed the default judgment of the Supreme Court of the District of Columbia[19] and upheld Rule 73 of the District of Columbia courts. "The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands." Fidelity

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[18] See generally, Bauman, The Evolution of the Summary Judgment Procedure, 31 Indiana Law J. 329 (1956).

[19] Now U.S. District Court for the District of Columbia.

at 320 (emphasis added). Fidelity relied on the authority of this Court's ruling, without opinion, in another typical debt collection case,[20] where the defendant's affidavit was insufficient under Rule 73. Rule 73 applies solely to actions ex contractu and requires an oath by affidavit accompanying the plea affirming the grounds for defense. As explained in the Rule[21] and the Fidelity ruling (at 198), the defendant's affidavit must state the grounds of defense, which if true, would be sufficient to defeat the plaintiff's claim. Nothing in Rule 73, or in the Fidelity decision, express or implied, suggests that a judge has the power in any type of case, to examine pre-trial evidence to

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[20] Smoot v. Rittenhouse, 27 Wash. Law Rep. 741 (1875).

[21] See Fidelity & Deposit Co. v. Unites States, 47 L.Ed. 194, 195 (1902).

determine the absence of a genuine issue of material fact and grant summary judgment to either party.

Fidelity serves as authority for summary judgment under Rule 73 of the District of Columbia, it does not serve as authority for the general summary judgment permitted unconstitutionally by Fed. Rule Civ. Proc. 56 and unknown at common law in 1791.

-E-

The background of Fed. Rule Civ. Proc. 56 reveals that summary judgment under the Rule violates the Seventh Amendment right of trial by jury.

Judge Charles E. Clark, judge of the U.S. Court of Appeals, Second Circuit and Dean of the Yale Law School was the reporter and member of the

Advisory Committee that devised the Federal Rules of Civil Procedure. It is apparent from Judge Clark's many publications[22] that his agenda was creating and promoting new rules of court, and at the top of the agenda was the summary judgment rule. Judge Clark is generally acknowledged as the father of summary judgment under Rule 56. "Mr. Clark . . . was probably responsible for the incorporation of this device in the suggested Federal Rules."[23] The snare of Rule 56 requires an understanding of the methodology

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[22] Including 38 Yale Law J. 423 (1928), 15 A.B.A.J. 82 (1929), 43 Yale Law J. 882 (1934), 2 F.R.D. 364 (1941), Code Pleading, 2d Ed. (1947), 3 Vanderbilt Law R. 493 (1950), 1 Syracuse Law R. 346 (1950), 36 Minn. Law R. 567 (1952).

[23] Johnson, Depositions, Discovery and Summary Judgments, Under the Proposed Uniform Federal Rules, 16 Texas Law R. 191, 200 note 28 (1937).

of Judge Clark and his group in promoting the rule.

According to Judge Clark, the summary judgment rule came into American procedure from the English practice by way of a New York rule.[24] The English practice was Keatings Act, enacted by Parliament, and entitled Summary Procedure on Bills of Exchange Act, (18 and 19 Victoria, c. 67, 1855). The New York rule was Rule 113 of the New York Rules of Civil Practice. Both the Act and the Rule established a summary judgment procedure for sham pleas of a defendant in limited actions ex contractu for debts. With reference to Rule 113, Judge Clark acknowledged that "The obvious difficulty was the constitutional

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[24] Clark, The Summary Judgment, 36 Minn. Law R. 567, 568, 569.

right of trial by jury, "but . . . the constitutionality of the procedure was established in New York . . ." citing two New York authorities.[25]

Hanna, at 514 makes clear that Rule 113 applied to a limited class of cases to recover debts and the constitutionality was grounded on the right to strike a defendant's sham plea in debt cases which right existed at common law in England "before our separation". (at 517 and 518). Hanna refers to similar rules declared constitutional; Rule 73 of the Supreme Court, District of Columbia (see Section D above). Rules 80 and 81 of the Supreme Court of New Jersey.[26] These rules require oaths by affidavit as to the

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[25] 36 Minn. Law R. supra at 568 note 5. Gen. Invest. Co. v. Interborough Rapid Transit Co., 235 N.Y. 133, 139 N.E. 216 (1923), Hanna v. Mitchell, 202 App. Div. 504, aff'd 235 N.Y. 534, 139 N.E. 724 (1923).

[26] Coykendall v. Robinson, 39 N.J.L. 98 (1876).

grounds for claims and defenses and do not call for pre-trial examination of evidence to preclude a jury trial. Here, Hanna at 516, refers to this Court's decision approving the requirement of an auditors report prior to trial in a dispute over a coal bill.[27] It was ruled that exploring evidence in advance of trial at a preliminary hearing does not infringe on the constitutional right of trial by jury; that the function of an auditors report is the same as that of pleading. And, "The parties will remain as free to call, examine, and cross-examine witnesses as if the report had not been made."[28]

Judge Clark recognized the "striking difference" between the limited New York rule and the broad summary judgment under Rule 56, unrestricted as

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[27] Ex Parte Peterson, 253 U.S. 300, 309, 310 (1920).
[28] ibid at 311

to type of case and open to defendant as well as plaintiff. Judge Clark observed "But when we came to the drafting of the Federal Rules, we found a considerable view that these limitations were not justified in themselves and led to confusion and waste in determining their application. So the shackles were stricken off, and the states have followed this lead." (emphasis added) 36 Minn. Law Rev. at 569.

The shackles stricken off were the Seventh Amendment restraints on judges. The resulting Rule 56, then, initiated by a committee of lawyers and approved by judges became a judicial repeal of the Seventh Amendment safeguard against judges.

" . . . in the federal courts . . . there has developed a system of "buttonhole" pleading and

practice,. created, sponsored and supported by a select coterie of "big business" lawyers not at all responsive to the "common touch."[29]

In devising Rule 56, the intent and purpose of the Seventh Amendment was disregarded. The jury is there to temper formal legal rules with equity and the common sense of laypersons, and to be a safeguard against judicial bias, corruption and oppressive acts. There is no room here for a judge to examine pre-trial evidence without the presence of witnesses, decide the absence of genuine issues of material fact and thereby foreclose a jury trial.

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[29] Rothschild, The Jurisdiction of the Court of Appeals, 13 Brooklyn Law R. 14, 16-17 note (1947)

The background of Rule 56 condemns it as a violation of the Seventh Amendment right of trial by jury.

-F-

The pattern of summary judgment reversals in the appellate court exemplifies the use of Fed. Rule Civ. Proc. 56 by judges to deny the Seventh Amendment right of trial by jury.

Between January, 1979 and June, 1983, there were 1265 appeals of summary judgment in the Ninth Circuit, exceeding one appeal per court day. Of this number only 63 percent were affirmed; of the 583 unpublished dispositions, 78 percent were affirmed; and of 515 published opinions, only 52 percent were affirmed.[30]

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[30] Schwartzer, Summary Judgment Under Federal Rules, 99 F.R.D. 465, 467 note 9 (1984).

This is a dismal performance record of trial judges applying the drastic measures of Rule 56 to dispose of cases before they are tried. Reversal of summary judgment does not alter the fact that a constitutional right has already been denied. Nor does the right of appeal redeem a constitutional right denied to one who is without the financial or emotional resources to persevere. Summary judgment increases the appellate court caseload, unduly delays the right of trial by jury to successful appellants, and wholly denies that right to an unknown number of non-appealing litigants.

The pattern of summary judgment reversals confirms the violation of the Seventh Amendment by judges in applying Rule 56, and undermines

the public policy of maintaining the peoples confidence in the courts.

-G-

In this case, the unreasoned ruling supporting the constitutionality of summary judgment illustrates the oppressive enforcement of Fed. Rule Civ. Proc. 56 in denying the Seventh Amendment right of trial by jury.

The appellate court affirmed, de novo, dismissal of an independent action in equity and failed to present any logical reason why summary judgment pursuant to Rule 56, complies with the Seventh Amendment. The court relied on the reasoning of two other cases, neither of which serves as authority (see Appendix, p.A-7):

1. Sengupta - "The Constitution only requires that bona fide fact questions be submitted to a jury."

2. Plaisance - " . . . the function of a jury is to try the material facts; where no such facts are in dispute, there is no occasion for jury trial."

Each case relies on the common law standard that factual issues are decided by a jury, or conversely, that a jury decision is not required in the absence of a factual issue; Sengupta by its interpretation of the Constitution and Plaisance by a form of syllogism. That factual issues are for a jury has long been settled at common law (Downman's Case, note 6 above). The question before the court, however, is whether summary judgment unconstitutionally denied the Seventh Amendment right of trial by jury. The court has simply assumed as untrue the very question at issue. Begging the question does not comply with

Ninth Circuit Rule 36-1 requiring a written, reasoned disposition of a case."

The dismissal in this case[31] is a demonstration of the type of oppressive rulings elicited by Rule 56 in providing for the denial of the Seventh Amendment right of trial by jury.

CONCLUSION

For the reasons presented herein, summary judgment granted pursuant to Fed. Rule Civ. Proc. 56 is an unconstitutional violation of the Seventh

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[31] There is a certain unfairness in the handling of this dismissal which should not go entirely unnoticed by this Court in its supervisorial capacity. The district court ignored the constitutional question, denied an oral hearing, and threatened sanctions. The appellate court acted as a district court in addressing the question, de novo, denied an oral hearing, and granted sanctions. Yet, there was no opportunity to appeal this sole ruling on the question. Presumably a petition for rehearing offers some recourse. But the imposition of sanctions chills the process, intimidating with the spectre of unknown, additional sanctions.

Amendment right of trial by jury. Petitioner prays, therefore, that a writ of certiorari issue to review and reverse the decision of the Ninth Circuit Court of Appeals.

DATED: 12-22-90 Respectfully submitted,

Alexander W. Malick

ALEXANDER W. MALICK
Petitioner-Pro se

(Appendix follows)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 85-16591
D.C. No. CV-89-2765-WWS

Alexander W. Malick
Plaintiff-Appellant

v.

Sandia Corporation
Defendant-Appellee

MEMORANDUM*
[Filed Sept. 24, 1990]

Appeal for the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding

Submitted September 18, 1990**

Before: GOODWIN, Chief Judge, HUG, and
BEEZER, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, we deny Malick's request for oral argument.

Alexander W. Malick appeals pro se the district court's order dismissing his action as barred on res judicata grounds. Malick's action sought to set aside the court's earlier grant of summary judgment in a diversity action for breach of contract and fraud against Sandia Corporation, his former employer. We have jurisdiction pursuant to 28 U.S.C. §1291 and affirm.

I.

Standard of Review

The district court's dismissal of an action on res judicata grounds is reviewed de novo. See Lea v. Republic Airlines, Inc., 903 F.2d 624, 634 (9th Cir. 1990). A party's entitlement to a jury trial in a federal court is a question of law reviewed de novo. See Standard Oil Co. of Calif. v. Arizona, 738 F.2d 1021, 1022-23 (9th Cir. 1984), cert. denied, 409 U.S. 1132 (1985).

II.

Merits

A. Res Judicata

Malick contends that the district court erred in finding that res judicata barred his action because exceptional circumstances created an "extrinsic

mistake" in this Court's decision affirming the district court's grant of summary judgment.[1]

"Federal Rule of Civil Procedure 60(b) provides that the rule 'does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.' Fed. R. Civ. P. 60(b). Thus, 'a federal court, in an independent action, has jurisdiction to modify a final judgment in a former proceeding on the ground of mistake . . . '" Narramore v. United States, 852 F.2d 485, 493 (9th Cir. 1988) (quoting West Virginia Oil & Gas v. George E. Breece Lumber Co., 213 F.2d 702,

[1]Malick also contends that the district court erred in applying the "law of the case" doctrine to this action because the action is separate and independent of the original suit. Because we find that the district court properly dismissed his action on res judicata grounds, we need not address this contention.

706 (5th Cir. 1954). Under the doctrine of res judicata, however, a final judgment bars further litigation by the same parties on the same cause of action. See Montana v. United States, 440 U.S. 147, 153 (1979); American Triticale, Inc. v. Nytco Serv., Inc., 664 F.2d 1136, 1146-47 (9th Cir. 1982) ("[a] judgment in a previous suit is conclusive in a second suit between the same parties or their privies on the same cause of action").

Here, Malick's action alleges that this Court committed an "extrinsic mistake" in affirming the district court's grant of summary judgment based on the Employee Retirement Income Security Act (ERISA), and not on the state law claims in his original complaint. This contention is without merit. In our amended memorandum affirming

the district court's grant of summary judgment, we explicitly found that all of Malick's "claims were properly dismissed [and that] Malick was not entitled to relief under either federal or state law." Malick v. Sandia Corp., No. 85-2299, amended unpublished memorandum at 3 (9th Cir. Nov. 13, 1986). Consequently, the district court's findings that our decision had reviewed and rejected Malick's state law claims was correct. Thus, the district court properly held that, absent any other grounds or evidence, it was barred from re-examining those same contentions.

B. Right to a Jury Trial

On appeal, Malick contends that the district court's grant of summary judgment pursuant to Fed. Rule Civ. Proc. 56 is unconstitutional because it deprives him of his Seventh Amendment right

to a jury trial. See Fed. R. Civ. P. 56. A grant of summary judgment does not violate the Seventh Amendment right to a jury trial. See Sengupta v. Morrison-Knudsen Co., Inc., 804 F.2d 1072, 1077-78 N.3 (9th Cir. 1986); see also Plaisance v. Phelps, 845 F.2d 107, 108 (5th Cir. 1988) ("[t]he function of a jury is to try the material facts; where no such facts are in dispute, there is no occasion for jury trial. Thus, the right to trial by jury does not prevent a court from granting summary judgment"). Therefore, this claim is wholly without merit.

III

Appellate Sanctions

Sandia Corp. requests sanctions against Malick for bringing this appeal. This Court has discretion to impose sanctions against litigants, even pro se,

for bringing a frivolous appeal. Fed. R. App. P. 38, 28 U.S.C. §1912; Wilcox v. Commissioner, 848 F.2d 1007, 1008-09 (9th Cir. 1988) ($1,500 sanction imposed on pro se litigant for bringing a frivolous appeal). An appeal is frivolous if the results are obvious, or the arguments of error are wholly without merit. Id. at 1009 (citation omitted).

Here, the district court warned Malick that his repetitive actions were sanctionable. Malick however, failed to heed the district court's warning. Malick's claims are wholly without merit; accordingly, we impose $500 damages as a sanction.

AFFIRMED.